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CATHY A. CATTERSON
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellant, v. CARLOS ALBERTO ESCOBAR, Defendant - Appellee.	No. 02-50626 D.C. No. CR-01-01290-RMT MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Robert M. Takasugi, District Judge, Presiding

Argued and Submitted June 3, 2003
Pasadena, California

Before: HALL, THOMAS, and PAEZ, Circuit Judges.

The government appeals the district court's grant of a new trial to Carlos Alberto Escobar ("Escobar"). Because the district court did not abuse its discretion in granting a new trial, we affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Because the parties are familiar with the history of this case, we will not recount it here. We review a decision to grant a new trial for abuse of discretion. *United States v. Alston*, 974 F.2d 1206, 1211 (9th Cir. 1992). Here, after considering the five requisite factors for granting a new trial based upon newly discovered evidence, the district court acted well within its discretion in granting Escobar a new trial. *United States v. Kulczyk*, 931 F.2d 542, 548 (9th Cir.), *as amended* (1991).

The district court determined that the evidence was newly discovered and defense counsel acted with due diligence. Prior to trial, Escobar was evaluated by a psychiatrist, who told defense counsel that Escobar was of "low to average intelligence and that he had no mental defect." The district court did not err, either in finding that the subsequent discovery that Escobar's IQ fell within the lowest 2 percent for individuals of his age group was newly discovered, or in concluding that defense counsel acted with due diligence despite her reliance upon the psychiatrist's initial report.

The newly discovered evidence was clearly material to Escobar's defense of duress. In light of the facts of the case, the evidence of his low IQ provided strong corroboration for his claim. Because Escobar's credibility was crucial to his

defense, this evidence was highly material, and was neither cumulative nor merely impeaching.

The district court concluded that had the evidence in question been presented at trial, the jury would probably have interpreted the evidence of duress differently. "Circuit judges, reading the dry pages of the record, do not experience the tenor of the testimony at trial. The balance of proof is often close and may hinge on personal evaluations of witness demeanor. . . . [A] court of appeals will only rarely reverse a district court's grant of the defendant's motion for a new trial, and then only in egregious cases." *Alston*, 974 F.2d at 1212. There is no indication that the district court abused its discretion in determining that the addition of the new information creates a high probability of acquittal.

AFFIRMED.